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IN THE

Supreme Court of the United States

October Term, 1963

No. 169

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, A Corporation,
Petitioner,

v.

STATE OF ALABAMA, EX REL.
RICHMOND M. FLOWERS, Attorney General.

BRIEF FOR PETITIONER

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INDEX

	PAGE
The Opinion Below	1
Jurisdiction	1
Question Presented	1
Statutory Provisions Involved	2
Statement	5
1. Summary History of The Proceedings in This Cause	5
2. The State's Complaint, As Amended, December 1961	7
3. Petitioner's Answer (R. 6-14)	8
4. The December 27-29 Hearing	9
The Trial Court's Ruling	14
Summary of Argument	14
Argument	16
I. Unless the mere good faith failure of a foreign corporation to register is itself a sufficient basis for ouster, the Trial Court's judgment is inconsistent with the due process requirements of the Fourteenth Amendment	16
II. The mere good faith failure of petitioner to register as a foreign corporation without more is not a sufficient basis upon which the judgment of the Trial Court can be sustained	19
III. State registration requirements cannot justify the deterrence or stifling of the exercise of constitutionally protected rights of freedom of speech and association	25
IV. The judgment of the Supreme Court of Alabama does not rest on sufficient state grounds to bar review by this Court	29

PAGE

V. This Court should formulate a detailed decree which, without the necessity of any further action on the part of the state court, will entitle petitioner to whatever relief the Court finds is appropriate in this case 33

Conclusion 35

Cases Cited

Aero Design & Engineering Co. v. Oklahoma Employment Security Commission, 151 F. Supp. 844, 846 (W. D. Okla. 1956), aff'd per curiam, 353 U. S. 943 32

Bank of United States v. Deveaux, 9 U. S. (5 Cranch.) 61 (1809) 24

Bates v. Little Rock, 361 U. S. 516 ..... 15, 26, 27, 28

Bell v. Fulgham, 202 Ala. 217, 80 So. 39 (1918) 30

Birmingham Electric v. Alabama Public Service Commission, 47 So. 2d 455 (1949) 30

Bolton v. Barnett Lumber Supply Co., 267 Ala. 74, 100 So. 2d 9 (1958) 29

Brooks v. Everett, 271 Ala. 380, 124 So. 2d 100 (1960) 30

Brothers v. Brothers, 94 So. 175 (1922) 30

Brown v. Tuskegee Light & Power Co., 232 Ala. 361, 367-368, 168 So. 159, 165 (1936) 20

Burns v. Ohio, 360 U. S. 252, 257 32

Burns Baking Co. v. Bryan, 264 U. S. 504 24

Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1 (8th Cir. 1907) 24

Canty v. Alabama, 309 U. S. 629 19

Christian v. Fidelity and Casualty Co. of New York, 264 Ala. 616, 88 So. 2d 840 (1956) 30

City of Montgomery v. Mott, 266 Ala. 422, 96 So. 2d 766 (1957) 30

PAGE

Conley v. Gibson, 355 U. S. 41, 48 32
Crutcher v. Kentucky, 141 U. S. 47 24

Davis v. Wechsler, 263 U. S. 22, 24 ..... 15, 30
Donald v. Phila. & Reading Coal & Iron Co., 241 U. S. 329 25
Douglas v. California, 372 U. S. 353 32

Eaton v. Woman's Home Missionary Society, 264 Ill. 88, 105 N. E. 746 (1914) 23
Edge v. Bice, 262 Ala. 273, 82 So. 2d 252, 254 (1955) 29, 30

Farmers Mutual Hail Ins. Co. of Iowa v. Gorsuch, 123 App. 264, 110 N. E. 2d 344 ..... 22n
Fields v. Fairfield, — U. S. —; 32 L. W. 4054 (Dec. 16, 1963) 14, 17
Fikes v. Alabama, 352 U. S. 191 19
Foman v. Davis, 371 U. S. 178, 181 33
Freeman v. Hewitt, 329 U. S. 249 24

Garner v. Louisiana, 368 U. S. 157 ..... 14, 18, 32
Gayle v. Browder, 352 U. S. 903 ..... 8n, 19
Gibson v. Florida Legislative Investigation Committee, 372 U. S. 539 ..... 26, 28
Griffin v. Illinois, 351 U. S. 12, 18 ..... 16, 32
Guy v. Lancaster, 250 Ala. 287, 290, 34 So. 2d 499, 502 (1948) 29

Hanover Fire Insurance Co. v. Harding, 272 U. S. 494 24
Harrison v. St. Louis & San Francisco Ry Co., 232 U. S. 318 25
Hartford Fire Insurance Co. v. Clark, 258 Ala. 141, 61 So. 2d 19 (1952) 30
Hill v. Florida, 325 U. S. 538, 543 25
Hovey v. Elliott, 167 U. S. 409 ..... 16, 32

Kendall Alabama Co. v. City of Fort Payne, 79 So. 2d 801 (1955) 30

Lafayette Ins. Co. v. French, 59 U. S. (18 How) 404, 407 25

PAGE

Lawton v. Steele, 152 U. S. 133 24
Liggett v. Baldridge, 278 U. S. 105 24
Louisiana v. NAACP, 366 U. S. 293 ..... 26, 28

Madison Limestone Co. v. McDonald, 264 Ala. 295, 87 So. 2d 539 (1956) 29
Maty v. Grasselli Chemical Co., 303 U. S. 197 32
Meyer v. Nebraska, 262 U. S. 390 24
Mitchell v. Wright, 154 F. 2d 924 (5th Cir. 1946), cert. denied, 329 U. S. 733 19
Montgomery Traction Co. v. Montgomery Light and Water Power Co., 229 Fed. 672 (5th Cir. 1916)... 23

NAACP v. Alabama, 357 U. S. 449 ..... 5, 15, 25, 26, 28, 30
NAACP v. Button, 371 U. S. 415 ..... 15, 25, 26
NAACP v. Webb's City [362] 27
National Union of Marine Cooks and Stewards v. Arnold, 348 U. S. 37, 41-45 32
New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552 27
New State Ice Co. v. Liebmann, 285 U. S. 262 24

People v. Jewish Consumptive's Relief Society, 196 Misc. 579, 92 N. Y. S. 2d 157 (1949) 22n
People v. National Cancer Hospital of America, 200 Misc. 363, 102 N. Y. S. 2d 103, 110, aff'd, 153 N. Y. S. 2d 63, 1 N. Y. 2d 802, (1956) 22n
Powell v. City of Birmingham, 258 Ala. 159, 167, 61 So. 2d 11, 18 (1952) 20
Pullman Co. v. Kansas, 216 U. S. 56, 63 25

Quinn v. Hannow, 80 So. 2d 239 (1955) 30

Reeves v. Alabama, 348 U. S. 891 19

Schware v. Board of Bar Examiners, 353 U. S. 232 24
Shelby County v. Baker, 269 Ala. 111, 110 So. 2d 896 (1959) 29
Shelton v. Tucker, 364 U. S. 479 ..... 15, 27, 28
Simmons v. Cochran, 252 Ala. 461, 41 So. 2d 579, 580 (1949) 30

PAGE

Simonetti Bros. Produce Co. v. Peter Fox Brewing Co., 240 Ala. 91, 197 So. 38 (1940) 24
Smyth v. Ames, 169 U. S. 466 24
Societe Internationale v. Rogers, 357 U. S. 197, 209, 210 32
Southern Railway v. Greene, 216 U. S. 400 24
Stariha v. Hagood, 40 So. 2d 85 (1949) 30
State v. Farabee, 268 Ala. 437, 108 So. 2d 148 (1959) 30
State ex rel Crossland v. Omaha & C. B. Ry., 91 Iowa 517, 60 N. W. 121 (1894) 23
State ex rel Roberson v. Town of Pell City, 157 Ala. 380, 47 So. 246 (1908) 20
Staub v. Baxley, 355 U. S. 313 ..... 15, 30, 31
Styles v. Lampert, 94 So. 2d 784 (1957) 30
Sweatt v. Painter, 339 U. S. 629 34

Taylor v. Alabama, 335 U. S. 252 19
Thompson v. Louisville, 362 U. S. 199 ..... 14, 17, 18
Thompson v. State, 267 Ala. 22, 99 So. 2d 198, 200 (1957) 29

United States v. Property on Pinto Island, 74 F. Supp. 92 (S. D. Ala. 1947) 20
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Warren Co. v. Exodus, 114 App. 563, 53 N. E. 2d 546 22n
Watson v. Memphis, 373 U. S. 526, 533 34
Western Union Telegraph Co. v. Kansas ex rel Coleman, 216 U. S. 1 24
Williams v. Standard Oil Co. of Louisiana, 278 U. S. 235 25
Wood v. Wood, 82 So. 2d 556 (1955) 30
Wright v. Georgia, 373 U. S. 284 ..... 15, 30, 31, 32

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PAGE

Alabama, Title 10, Code of Alabama (1959):
- Section 21(90) 2, 7, 18, 20
- Section 21(91) 3, 7, 18, 20
- Section 21(92) 3, 7, 18, 20
- Section 21(93) 3, 7, 18, 20
- Section 21(94) 4, 7, 18, 20
- Section 21(95) 4
- Section 21(96) 4

Arizona, Constitution, Art. 14:
- Section 17 (Rev. Stat. Ann., 1956) 20n

California, Corp. Code, (as amended, 1959):
- Section 6403 ..... 20n
- Section 6408 ..... 20n

Idaho, Gen. Laws Ann. (1947):
- Section 30-501 (as amended, 1955) 20n
- Section 30-508 ..... 20n
- Section 30-509 ..... 20n
- Section 30-510 ..... 21n

Indiana, Ann. Statutes (1960):
- Section 25-314 ..... 22n

Iowa, Code Ann. (1949):
- Section 494.1, (as amended, 1951) 21n
- Section 494.12 ..... 21n
- Section 494.9 ..... 21n

Massachusetts, Gen. Laws Ann. (1955):
- Chapter 181, Section 19 (as amended, 1962) 22n

Nevada, Rev. Stat. (Supp., 1959):
- Section 80.160 ..... 22n
- Section 80.170 ..... 22n

New Hampshire, Rev. Stat. Ann. (1955):
- Section 300:7 ..... 22n

PAGE

New Jersey, Stat. Ann. (1937):
Section 14:15-3 ..... 21n
Section 14:15-6 ..... 21n

New York, Gen. Corp. Law (1963):
Section 219 ..... 22n

North Dakota, Century Code Ann. (1960):
Section 10-22-01 (as amended, 1961) 21n
Section 10-22-19 ..... 21n

Ohio, Rev. Code Ann.:
Section 1703.28 ..... 22n

Rhode Island, Gen. Laws Ann. (1956):
Section 7-2-23 ..... 21n
Section 7-2-28 ..... 21n

Texas, Civ. Stat. Ann (1955):
Article 8.01 ..... 21n
Article 8.18 ..... 21n

Vermont, Stat. Ann. (1958):
Title 11, Section 861 ..... 22n
Title 11, Section 862 ..... 22n

Virginia, Code Ann. (1950):
Section 13.1-102 (as amended, 1956) 21n
Section 13.1-119 (as amended, 1956) 21n

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Section 17-36.95 (as amended, 1961) 21n
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STATE OF ALABAMA, EX REL. RICHMOND M. FLOWERS, Attorney General.

BRIEF FOR PETITIONER

The Opinion Below

The opinion of the Supreme Court of Alabama (R. 221-229), affirming the judgment of the Circuit Court of Montgomery County, Alabama (R. 209-212), is reported at 150 So. 2d 677.

Jurisdiction

The judgment of the Supreme Court of Alabama was entered on February 28, 1963 (R. 220). Petition for writ of certiorari was filed on May 29, 1963, and was granted on October 14, 1963.

Question Presented

Whether the record of these proceedings discloses that petitioner, its members, prospective members and contributors have been denied rights of due process, equal protection of the laws, freedom of expression and freedom of

association, secured and guaranteed under the Fourteenth Amendment to the Constitution of the United States against state intrusion, and provides the basis for affirmative relief by this Court to insure to petitioner and its members the full enjoyment of the aforesaid rights denied by the courts below.

Statutory Provisions Involved

Title 10, Code of Alabama, 1959, as amended:

§ 21(90). *Foreign corporation must file articles of association, etc., and instrument designating process agent and place of business.*—Every foreign corporation shall, before engaging in or transacting any business in this state, file with the secretary of state a certified copy of its articles of incorporation or association, together with such other information as may be required by the secretary of state, and file an instrument of writing, under the seal of the corporation and signed officially by the chairman of the board, president or executive vice-president and the treasurer or secretary or the officer holding the authority and exercising the duties of secretary, thereof, designating at least one known place of business in this state and an authorized agent or agents residing thereat, and pay all fees and taxes and make all tax returns required by law; and when any such corporation shall amend its articles of incorporation, it shall within ten days thereafter file a certified copy of such amendment; or if such corporation shall abandon or change its place of business as designated in such instrument theretofore filed with the secretary of state, or shall substitute another agent or agents for the agent or agents designated in such instrument of writing, such corporation shall file a new instrument of writing setting forth such change before transacting any

further business in this state. (1959, p. 1099, § 90, appvd. Nov. 13, 1959.)

§ 21(91). *Where filed and fee for filing.*—Such instrument when filed by a foreign corporation engaged in any business of insurance must be filed in the office of the superintendent of insurance, and when filed by a foreign corporation engaged in any other business than that of insurance must be filed in the office of the secretary of state, and there shall be paid at the same time for filing such instrument to the officer with whom the same is filed the sum of ten dollars for the use of the state. (1959, p. 1099, § 91, appvd. Nov. 13, 1959.)

§ 21(92). *Unlawful to transact business in state before sections* 21(90) *and* 21(92) *complied with; penalty.*—It is unlawful for any foreign corporation to engage in or transact any business in this state before complying with provisions of the two preceding sections; and any such corporation that engages in or transacts any business in this state without complying with the provisions of the two preceding sections shall, for each offense, forfeit and pay to the state the sum of one thousand dollars. (1959, p. 1100, § 92, appvd. Nov. 13, 1959.)

§ 21(93). *Unlawful to act as agent of foreign corporation before such instrument is filed; penalty.*—It is unlawful for any person to act as agent or transact any business, directly or indirectly, in this state, for or on behalf of any foreign corporation which has not designated a known place of business in this state and an authorized agent or agents residing thereat, as required in this chapter; and any person so doing shall, for each offense, forfeit and pay to the state the sum of five hundred dollars. (1959, p. 1100, § 93, appvd. Nov. 13, 1959.)

§ 21(94). *Foreign corporations, their agents, officers, etc., contracting or doing business in state without license, penalty for.*—Any foreign corporation or any person acting as agent, servant, or officer of such foreign corporation who shall make or attempt to make any contract, agreement, undertaking, or engagement with, by, or in the name of or for the use or benefit of any such corporation without a license authorizing such corporation to do business in this state, or after such license shall have been cancelled, shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than one hundred dollars, nor more than one thousand dollars and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than twelve months, one or both, at the discretion of the jury trying the case. (1959, p. 1100, § 94, appvd. Nov. 13, 1959.)

§ 21(95). *Solictor must enforce penalties; commissions.*—Every penalty provided for under sections 21(92) through 21(94) of this title shall be sued for and recovered in the name of the state of Alabama by the solicitor of the circuit or county in which the offense is committed; and when collected, must be paid by the solicitor into the state treasury for the use of the state. (1959, p. 1100, § 95, appvd. Nov. 13, 1959.)

§ 21(96). *Exceptions.*—The provisions of sections 21(89) through 21(95) do not apply to corporations organized under the laws of the United States; nor to corporations engaging in or transacting business of interstate commerce only within this state. (1959, p. 1100, § 96, appvd. Nov. 13, 1959.)

Statement

1. Summary History of The Proceedings in This Cause.

This case began on June 1, 1956, with the filing of a complaint by the Attorney General (R. 1-4) and issuance *ex parte* of a temporary restraining order and injunction barring petitioner from engaging in any activities in Alabama and prohibiting compliance with the state law, supposedly violated, requiring foreign corporations to register with the Secretary of State (R. 5-6). Petitioner filed a motion to dissolve the injunction and an answer to the state's complaint (R. 6-14). Before hearing on petitioner's motion, the trial court entered an interlocutory order requiring petitioner to disclose the names and addresses of its members. Upon its refusal to comply, petitioner was adjudged in contempt. In June, 1958, on review here, the contempt adjudication was reversed. *NAACP* v. *Alabama*, 357 U. S. 449.[1]

Upon remand, the Supreme Court of Alabama again affirmed the contempt adjudication upon the grounds that petitioner had failed to comply with provisions of the interlocutory order other than those requiring the disclosure of the names of its members, 109 S. 2d 138 (1959). In June, 1959, the cause was again reviewed here, and it was held that the case had been argued, briefed and disposed of by the parties on the grounds that except for the membership list, petitioner had satisfactorily complied with the order below (360 U. S. 240). The Court said at pages 243, 244:

> We take it from the record before us that the Supreme Court of Alabama evidently was not acquainted with the detailed basis of the proceedings here and the consequent ground for our defined disposition. * * * . . .

[1] While the case was under consideration by this Court, the state instituted further contempt proceedings against petitioner in April, 1958. That trial was never brought to a final conclusion.

> . . . We assume that the State Supreme Court, thus advised, will not fail to proceed promptly with the disposition of the matters left open under our mandate for further proceedings, 357 U. S. at 467. . . .

On remand, the Supreme Court of Alabama, however, persisted in its refusal or failure to act upon the mandate of this Court. After months of unsuccessfully attempting to obtain a hearing on the merits in the state courts, petitioner, on June 27, 1960, instituted proceedings in the United States District Court for the Middle District of Alabama seeking to test in that court the validity of its ouster from the state. That phase of these proceedings eventually was brought here, and on October 23, 1961, this Court ordered the federal district court to retain jurisdiction of this cause and to proceed "with a trial of the issues in this action," unless no later than January 2, 1962, the state had accorded petitioner a hearing on its motion to dissolve the June 1, 1956, injunction and upon the merits of the action in which such order was issued.

On December 27-29, 1961, a hearing on the merits took place in the Circuit Court of Montgomery County. On December 29, at the close of that hearing, the court issued a final decree which in effect made the 5½-year old "temporary" restraining order and injunction permanent (R. 209-212). The court reserved "the right at a future date to state in an opinion its full and complete findings of fact and its rulings on the law in this case, with appropriate citations of authorities" (R. 212). This right, however, was never exercised.

An appeal was taken to the Supreme Court of Alabama (R. 217) and argued there on December 18, 1962 (R. 219). On February 28, 1963, the Supreme Court of Alabama affirmed the judgment of the trial court without considering the merits of the case. Asserting that "[r]ules of procedure are not traps concocted to evade decisions," the

court held that the argument section of petitioner's brief was so inadequate, and so at variance with its rules of practice, that the court had no recourse other than to affirm the trial court's judgment on procedural grounds. Thus, the cause is here for review for the fourth time in its protracted history.

2. The State's Complaint, As Amended, December 1961.

The bill of complaint (R. 1-4) alleges that petitioner is a New York corporation; that it maintains a Southeast Regional Office at 1630 Fourth Avenue, North, in Birmingham, Alabama; that it has local chapters and affiliates operating within the state; that it "employed or otherwise paid" Autherine Lucy and Polly Ann Myers to enroll at the University of Alabama; that it furnished counsel to Autherine Lucy in her proceedings against the University of Alabama seeking her admission therein; that it organized, supported and financed an illegal boycott in Montgomery, Alabama, to compel the Capital Motor Lines, a common carrier, to integrate its buses; that petitioner was collecting and expending monies to advance its aims and purposes in Alabama; that petitioner had never complied with Section 192, 193 and 194 of Title 10, Code of Alabama, 1940;[2] that it was doing business in the state without complying with these provisions to the irreparable injury of the citizens of Alabama.

Subsequently, five and a half years later, in December, 1961, the bill of complaint was amended (R. 14-17.)[3] The added allegations assert that petitioner had falsely charged

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[2] These and Sections 190, 191 of the same Title require foreign corporations to file a certified copy of their Articles of Incorporation with the Secretary of State, to designate a place of business and an authorized agent in the state for the purpose of accepting service, and exact a fine and forfeiture for failure to comply. These provisions are now codified as Title 10, Sections 21(90), 21(91), 21(92), 21(93) and 21(94), Code of Alabama, 1959, as amended.

[3] Paragraph E was not allowed, but all other amendments were granted (R. 52).

agents of the state and trustees of the University of Alabama "with acts which would appear to constitute a violation of [state] criminal conspiracy statutes . . . against riots and mobs, and . . . of . . . Title 18, USCA, Section 241 . . . as found by . . . Judge Grooms on January 24, 1957 in the case of *Lucy, et al.* v. *Adams* . . ."; that petitioner had falsely charged the Attorney General, the state courts and judiciary with "arbitrary, vindictive and collusive" action to prevent a determination of the lawfulness of its ouster by an impartial judicial tribunal and to withhold and deny access to the state courts for a hearing on the merits; that petitioner had falsely charged the Attorney General with filing contempt proceedings against the organization in April, 1958, knowing these allegations to be untrue.

It is further alleged that petitioner wilfully violated the restraining order of June, 1956, "by continuing to carry on activities in the State by and through the Alabama State Coordinating Association for Registration and Voting and by other means known to W. C. Patton, W. P. Mitchell and Roy Wilkins . . ."; that petitioner encouraged, aided and abetted unlawful breaches of the peace in many cities of the state "for the purpose of gaining national notoriety and attention to enable it to raise funds under a false claim that it is for the protection of alleged constitutional rights"; and that petitioner encouraged, aided and abetted a course of conduct "seeking to deny to the citizens of Alabama the constitutional right to voluntarily segregate (*sic*)." Finally, paragraph 9 of the original bill of complaint was amended by striking therefrom all language after race.[4]

3. Petitioner's Answer (R. 6-14).

In its answer, petitioner alleged that it was a New York corporation; that it had members and affiliate units in the state; that it had established in 1951 a Southeast Regional

[4] This is in apparent recognition of the fact that *Gayle* v. *Browder*, 352 U. S. 903, has some force and effect in Alabama.

Office in Birmingham, with Mrs. Ruby Hurley and W. C. Patton in charge; that it had not employed or paid any monies to Polly Myers Hudson or Autherine Lucy; that it had given moral and financial support and legal assistance to Negroes in Montgomery in their efforts to obtain an end to racial discrimination on the buses there; that it had helped to provide counsel for Martin Luther King when he had been prosecuted as the leader of that protest.

Petitioner admitted that it had not complied with Title 10, but asserted that the statute did not apply to it; that it had been openly and continuously operating in Alabama since 1918 with the state's knowledge, and that hence the state was barred by laches from relief in equity; that these proceedings had not been commenced in good faith, for although the Attorney General had been in correspondence with petitioner as late as May 14, 1956, he had not advised petitioner that it was violating any state law; that the real purpose of the action was to prevent citizens of Alabama from seeking an end to racial segregation and discrimination in concert with petitioner, and that prohibition of such activities constituted an unconstitutional denial of rights of freedom of expression and association, due process and equal protection of the laws guaranteed under the Fourteenth Amendment; that its acts had caused no injury to any Alabama citizen; that it had completed the requisite registration form, had attached them to its answer and, if permitted, was prepared to file them with the Secretary of State, thus waiving its claims that Title 10 was not applicable to it. Such permission was denied.

4. The December 27-29 Hearing.

At the outset, petitioner objected to segregation in the court room and to the fact that Negroes were not granted the same courtesy accorded white persons and requested the court to take corrective action on both matters. Both motions were denied (R. 36-37).

The motion to dissolve the "temporary" restraining order was argued and denied (R. 52-59). The state then proceeded to present its case.

The state introduced in evidence a transcript of the record filed in the United States Court of Appeals in this cause (R. 155-156), the opinion and findings of fact of United States District Court Judge Grooms in *Lucy* v. *Adams*, and a certified copy of the conviction of Martin Luther King and a dismissal of the appeal (R. 157-160), for his activity in connection with the Montgomery bus boycott.

The state then called the following witnesses:

Stewart Culpepper—photographer and part-time newspaper reporter—(R. 65-74).

He testified that he had been in Atlanta, Georgia on November 17, 1957, at a meeting concerned with voter registration presided over by Roy Wilkins, NAACP Executive Secretary; that W. C. Patton had been chosen to represent Alabama on a seven man committee responsible for implementing the decisions of the conference. Several photographs of persons in attendance were introduced into evidence.

Ted A. May—District Manager of Western Union, Birmingham—(R. 74-80).

He testified that on August 6, 1961, a telegram had been sent from Birmingham by W. C. Patton to a C. W. Lee at the Sheraton Hotel, Washington, D. C. The telegram authorized Mr. Lee to represent the Association in a plea for a contribution (R. 77).

C. W. Lee—Vice President of the National Funeral Directors—(R. 81-93).

Mr. Lee testified that he had stopped being a member of the NAACP when the organization ceased operating in 1956; that he had received the telegram from Mr. Patton; that the National Funeral Directors Association was meeting at the Sheraton Park Hotel in Washington at that time;

that he was a member of the Alabama State Coordinating Association for Registration and Voting; that the organization had been organized in 1952 and had been incorporated in 1957 (R. 82); that he had been a member of this organization since 1952 (R. 87); and that while the NAACP had been operating in Alabama, he had been a member of both organizations (R. 88); that Mr. Patton's telegram referred to the Alabama State Coordinating Association and not to the NAACP (R. 87).

W. C. Patton—NAACP Field Secretary—(R. 93-101, 138-156).

Mr. Patton testified that he lived in Birmingham, Alabama (R. 93); that he had been connected with the NAACP for the past ten to fifteen years (R. 94); that he had been President of the Birmingham Branch, Alabama State Conference and NAACP Field Secretary (R. 95); that he has been a full-time employee of the NAACP since 1958 as Field Secretary; that from June 1, 1956 to December 31, 1956, he had been placed on terminal pay; that he had no connection with the organization in 1957 (R. 153); that he had engaged in no NAACP activities in Alabama in his capacity as NAACP employee since June 1, 1956 to the present (R. 154); and that he had engaged in no NAACP activities in Alabama of any kind or description whatsoever since June 1, 1956 (R. 154-155); that he had made phone calls to Roy Wilkins, Mrs. Ruby Hurley, to NAACP office in New York and Memphis and to other persons in Alabama since 1956 (R. 138-142, 149-153); that the NAACP office in Birmingham was closed (R. 146); that he is President of the Alabama State Coordinating Association For Registration and Voting which had been incorporated in 1957 (R. 96) and that neither Roy Wilkins nor Thurgood Marshall had had anything to do with the formation of that organization (R. 96).

William M. Eagerton—Public Relations Manager for the Southern Bell Telephone Company, Birmingham, Alabama—(R. 102-137).

He testified concerning long distance telephone calls that had been made from Mr. Patton's telephone number in Birmingham after June 1, 1956 to various people around the country—to Roy Wilkins in New York, to Mrs. Hurley in Atlanta, and to a number in Memphis and to various other people in Alabama. He then proceeded to list all the long distance telephone calls made from Mr. Patton's telephone since June 1, 1956.

Phillip M. Lightfoot—Mayor of Tuskegee, Alabama—(R. 161-164).

He introduced several pamphlets which had been distributed and sent to him by the Tuskegee NAACP Branch dated November 21, 1954 and November 28, 1954; he did not recall having received any documents of this kind since June 1, 1956 (R. 162).

Dr. C. J. Rehling—Toxicologist and Director of the State Crime Laboratory and handwriting expert on the side—(R. 165-171).

He compared the handwriting of a Mrs. Taggart on her driver's operator license, with the handwriting of a letter introduced into evidence. He found that they were written by one and the same person. (The letter asked the receiver to make a contribution to the NAACP).

Harry Cobbs—Assistant Manager in the Bookkeeping Department of the First National Bank of Birmingham—(R. 172-174).

He testified that Mrs. Taggart's address was 330 12th Avenue, North, Birmingham—the same address on the letter introduced into evidence.

The state rested. Petitioner moved to dismiss and for judgment in its favor. The motion was denied (R. 175-180). Petitioner, thereupon, introduced testimony in its defense, as follows:

Roy Wilkins—NAACP Executive Secretary—(R. 180-199).

He explained the structure of the NAACP and the kind of activities it undertakes; that the Attorney General of Alabama had written to him in January, 1956, requesting a copy of the NAACP's Articles of Incorporation; that these had been sent, and on May 14, 1956, he had received from the Attorney General a note of thanks, but at no time had the Attorney General indicated that the Association was operating in violation of Alabama law (R. 183); that since June, 1956, when the injunction was issued against the Association, it had closed its offices in Birmingham and ceased all operations in the state; that the letter which was introduced into evidence, as being written by Mrs. Taggart, was an appeal for funds for the NAACP which had been sent at the direction of the Links, a national organization of Negro women; that the Links had undertaken this project in 1960 in an effort to raise funds for the NAACP (R. 186); that the NAACP was not connected in any way with the Alabama Coordinating Association for Registration and Voting, the Montgomery Improvement Association, or the Tuskegee Civic Association (R. 187); that the NAACP had conducted no business of any kind in Alabama since June, 1956 (R. 187-188); that there were some 29 known individual members who maintained their membership in the Association by mailing their dues to the New York office, but this was wholly unsolicited (R. 188).

MacDonald Gallion—Attorney General—(R. 200-203).

A proffer was made that if he were allowed to testify that he would have admitted that since his connection with the Attorney General's office no action, such as the present, had ever been brought against any other organization in the state (R. 203).

William F. Thetford—Circuit Solicitor of the Fifteenth Judicial Circuit—(R. 204-206).

He testified that he had occupied this position for 11 years and that during that time his office had never brought

an action such as this against any foreign corporation; that he knew the NAACP was doing business in Alabama, but did not know it had not qualified to do so.

There was additional testimony, not printed in this record, by the Chief of the Franchise Tax Division, who testified that on October 4, 1960, he had advised the First Manassas Corporation, a nonprofit organization, which had written to his office about qualifying to do business in the state, that it did not have to comply with Title 10.

The Trial Court's Ruling.

At the close of the testimony, the trial court held that the state's case against petitioner had been proved and issued a permanent injunction barring petitioner from the state (R. 209-212).

Summary of Argument

None of the charges of unlawful conduct, pursuant to which the state sought to justify injunctive relief, was supported at the trial on the merits by adequate evidentiary proof. See *Thompson* v. *Louisville*, 362 U. S. 199; *Fields* v. *Fairfield*, — U. S. —; 32 L. W. 4054, decided Dec. 16, 1963; *Garner* v. *Louisiana*, 368 U. S. 157. Petitioner admitted its failure to register with the Alabama Secretary of State as an out-of-state corporation but asserted that this omission was based upon a belief, held in good faith, that the statutory provisions in question did not apply to the organization. Nonetheless, at the outset of these proceedings in 1956, it expressed a willingness to waive its rights and comply with the state's foreign corporations' registration provisions, if permitted to do so by the court. Such permission was denied.

As the record now stands, unless petitioner's failure to register in and of itself constitutes a valid basis for ouster, the decree of the trial court cannot be sustained.

Title 10 of the Alabama Code, in its application to foreign corporations, as are the overwhelming majority of statutes of its kind, sets forth merely venue and service of process requirements. Its main purpose, like the others, is to secure information, raise revenue and protect residents of the state who might get into controversy with the out-of-state corporation. In the absence of specific statutory authority, the use of provisions of this nature to oust a foreign corporation is virtually unprecedented.

Moreover, petitioner and its members are protected in the exercise of rights of freedom of speech and association against both broad and comprehensive restrictions, as well as subtle and indirect deterrents. See *NAACP* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516; *NAACP* v. *Button*, 371 U. S. 415, and cognate cases. Even where a valid state interest exists, necessitating an incidental interference with the exercise of these freedoms, the state's regulations must be selective and precise. See *Shelton* v. *Tucker*, 364 U. S. 479. The rationale of these cases makes evident, therefore, that whatever punitive action Alabama authorities may properly invoke, because of petitioner's failure to register as a foreign corporation, they must follow that course which impinges least upon the full enjoyment of the rights of freedom of expression and association by petitioner and its members.

The State Supreme Court has attempted to erect a barrier to a review by this Court in the interposition of a new and novel interpretation of its own rules of procedure. *Davis* v. *Wechsler*, 263 U. S. 22; *NAACP* v. *Alabama*, *supra*, clearly indicate that such attempts cannot prevail. The rationale of *Staub* v. *Baxley*, 355 U. S. 313, and *Wright* v. *Georgia*, 373 U. S. 284, moreover, stand for the principle that even absent newness and uniqueness in the state's procedural regulations, barriers to review of federally asserted claims will not be countenanced by this Court, when grounded in outmoded technicalities and arid

rituals of form. The protracted history of this case, the trivial and superficial grounds upon which the Alabama Supreme Court based its avoidance of review on the merits constitute a denial by that court to petitioner of its day in court. Thus, petitioner respectfully submits, it has been denied due process within the meaning of *Hovey* v. *Elliot*, 167 U. S. 409, as well as equal protection of the laws. See *Griffin* v. *Illinois*, 351 U. S. 12.

The course of these proceedings, now here for a fourth time, and the doggedness of the Supreme Court of Alabama in refusing to follow the mandate of this Court make it clear that if petitioner's claims are vindicated, neither it, nor its members will enjoy in Alabama in the foreseeable future any of the rights sustained here, unless this Court fashions a detailed decree that will permit petitioner and its members to assert those rights, without the need of further recourse to the state courts of Alabama to effectuate this Court's mandate.

ARGUMENT

I.

Unless the mere good faith failure of a foreign corporation to register is itself a sufficient basis for ouster, the Trial Court's judgment is inconsistent with the due process requirements of the Fourteenth Amendment.

At the hearing below, no attempt was made to prove most of the state's allegations set forth in its bill of complaint and as amended, (*e.g.*, that petitioner had employed or paid Autherine Lucy, etc. (R. 2); that its activities were causing irreparable injury to the property and civil rights of residents of the State of Alabama (R. 3); that it was aiding and abetting unlawful breaches of the peace in many

cities of the state and seeking to deny to Alabama citizens the right to segregate voluntarily (R. 16)). These charges stand completely unsupported by any semblance of evidentiary proof.

Apparently, the state's theory was that it could show that petitioner had violated the June 1, 1956 "temporary restraining order and injunction" by evidence that petitioner and the Alabama Coordinating Association for Registration and Voting were in fact one and the same; that W. C. Patton, NAACP Field Secretary, had been engaged in activities in Alabama since 1956, in violation of the injunction; and that the organization itself was continuing to carry on activities in the state in violation of the restraining order.

The state's theory collapsed for lack of testimonial support. Indeed, the uncontroverted evidence is all to the contrary, that: (1) the Alabama Coordinating Association for Registration and Voting is an organization completely independent of, and with no ties to petitioner; (2) Mr. Patton had not engaged in any NAACP activities in the State of Alabama since June 1, 1956; and (3) petitioner had closed its office in Birmingham, solicited no members and had carried on no activites of any kind whatsoever since the date the injunction was issued. Consequently, petitioner stands completely vindicated on this record of any violation of the June 1, 1956, restraining order. Certainly if petitioner is guilty of an offense warranting punishment, that transgression must be established by appropriate evidence set forth in this record. See *Thompson* v. *Louisville*, 362 U. S. 199; *Garner* v. *Louisiana*, 368 U. S. 157; *Fields* v. *Fairfield*, — U. S. —, 32 L. W. 4054, decided December 16, 1963.

The trial judge asserts that the state's allegations "have been proved by the overwhelming weight of the testimony" (R. 209), but this statement is insufficient to render proved what has not been established. Mr. Justice Frankfurter,

concurring in *Garner* v. *Louisiana, supra,* at page 175, has put the matter aptly and succinctly:

> A judge's private knowledge, or even "knowledge by notoriety," to use Dean Wigmore's phrase, IX Evidence, Sec. 2569 (Third ed. 1940), not presented as part of the prosecution's case capable of being met by a defendant, is not an adequate basis, as a matter of due process, to establish an essential element of what is punished as crime. *Thompson* v. *City of Louisville,* 362 U. S. 199.
>
> It may be unnecessary to require formal proof, even as to an issue crucial in determining guilt in a criminal prosecution, of what is incontestably obvious. But some showing cannot be dispensed with when an inference is at all doubtful.

Here, the only evidentiary proof of a violation of Alabama law by petitioner is its own admission filed in its answer in 1956, that it had failed to comply with Title 10, Sections 190-194, Code of Alabama, 1940 [now Sections 21(90), 21(91), 21(92), 21(93) and 21(94), Code of Alabama, 1959 as amended]. While willing to waive its claim of immunity to the requirement to register, petitioner averred then that it did not believe these provisions were applicable to it. Evidence at the trial showing that a non-profit corporation had been advised by the Chief of the State Franchise Tax Division on October 4, 1960, that it "was exempt from qualifying as a foreign corporation", would seem to support this view. However untenable petitioner's views may be as to Alabama provisions having application to it, unless its mere failure to register can justify its permanent ouster and a denial of the right to solicit members or maintain affiliate units in the state, there is no evidentiary support to sustain the judgment below. See *Thompson* v. *Louisville, supra.* Under these circumstances, the judgment is in derogation of petitioner's rights of substantive due process.

II.

The mere good faith failure of petitioner to register as a foreign corporation without more is not a sufficient basis upon which the judgment of the Trial Court can be sustained.

1. Petitioner has had members and affiliates in Alabama continuously since 1918. All during that period, it has operated openly and, with the full knowledge of state officials, sponsored and supported litigation to vindicate a broad range of civil rights of Negro citizens in the state (*e.g.*, *Canty* v. *Alabama*, 309 U. S. 629; *Fikes* v. *Alabama*, 352 U. S. 191; *Mitchell* v. *Wright*, 154 F. 2d 924 (5th Cir. 1946), cert. denied, 329 U. S. 733; *Gayle* v. *Browder*, 352 U. S. 903; *Reeves* v. *Alabama*, 348 U. S. 891; *Taylor* v. *Alabama*, 335 U. S. 252. As late as May, 1956, the State Attorney General was in correspondence with petitioner's chief executive officer requesting copies of the charter and constitution of the organization and other information. At no time did the Attorney General suggest that petitioner was violating the laws of the state. Yet, on June 1, 1956, proceedings were commenced alleging a violation of state law.

Under these circumstances, petitioner respectfully submits, the doctrine of laches bars recourse to relief in equity. In *United States* v. *Stinson*, 125 F. 907, 910 (7th Cir. 1903), aff'd., 197 U. S. 200, the basic rule as to the application of equity to actions by the government was laid down. There it was said:

> The government may not in conscience ask a court of equity to set on foot an inquiry that, under the circumstances of the case, would be an unfair or inequitable inquiry. The substantial considerations underlying the doctrine of estoppel apply to government as well as to individuals.

Alabama decisions are to the same effect. In *Brown* v. *Tuskegee Light & Power Co.*, 232 Ala. 361, 367-368, 168 So. 159, 165 (1936), the Supreme Court of Alabama said:

> In effectuating this elemental principle denying relief in equity which is not equitable, our Court, in common with prevailing authorities generally, applies the doctrine of estoppel in pais even against the state or its governing subdivision.

Laches was held to be a barrier against the state to relief in equity in *United States* v. *Property on Pinto Island*, 74 F. Supp. 92 (S. D. Ala. 1947); *State ex rel Roberson* v. *Town of Pell City*, 157 Ala. 380, 47 So. 246 (1908); *Powell* v. *City of Birmingham*, 258 Ala. 159, 167, 61 So. 2d 11, 18 (1952).

2. Title 10, Sections 190-194, Code of Alabama 1940 [now recodified as Title 10, Sections 21(90), 21(91), 21(93) and 21(94) of the Code of Alabama, 1959, as amended)] are mere venue and service of process provisions. While a fine for noncompliance is provided, there is no statutory language authorizing the ouster of a foreign corporation which has not complied with the foreign corporation provisions, but is willing to do so. These provisions are similar to those of the overwhelming majority of state statutes dealing with the registration of foreign corporations.[5]

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[5] See e.g., Arizona Constitution, Article 14, Section 17 (Revised Statutes Ann., 1956), which provides that no foreign corporation shall have authority to do business in the state until it shall have obtained from the corporation commission a license to do business upon such terms as may be prescribed by law.

California Corporations Code (as amended 1959), Section 6403 provides that a foreign corporation shall not transact intrastate business without having obtained from the Secretary of State a certificate of qualification; Section 6408 imposes a fine for noncompliance and provides that the commissioner of corporations shall be deemed an agent for service of process for such noncomplying corporations.

General Laws of Idaho Ann. (1947), Section 30-501 (as amended 1955) provides that foreign corporations must register with the Secretary of State before doing business; Section 30-508 makes officers of noncomplying corporations personally liable; Section 30-509 denies the benefit of the statute of limitations to corporations during periods of time when no one has been designated as agent for

There are some jurisdictions where statutory authority for the exclusion of an out-of-state state corporation that

service of process; Section 30-510 provides that upon compliance such a foreign corporation shall have the same rights as a domestic corporation.

Iowa Code Ann. (1949), Section 494.1 (as amended, 1951) provides that any foreign corporation shall file certain information with the Secretary of State prior to doing business in the state, and shall ask for the issuance of a permit to do business; Section 494.12 provides a fine for doing business without a permit; Section 494.9 provides that a foreign corporation cannot sue on a contract made before the permit is issued.

New Jersey Statutes Ann. (1937), Section 14:15-3 provides that foreign corporations must have a certificate of authority to do business; Section 14:15-6 provides a fine for doing business without such a certificate.

North Dakota Century Code Ann. (1960), Section 10-22-01 (as amended, 1961) provides that foreign corporations must obtain a certificate of authority from the Secretary of State; Section 10-22-19 provides that a noncomplying corporation may not sue on a contract within the state until it has obtained a certificate of authority, and also provides fees and monetary penalties.

General Laws of Rhode Island Ann. (1956), Section 7-2-23 provides that foreign corporations must register and pay a fee as a condition precedent to carrying on business in the state; Section 7-2-28 provides that failure to comply shall result in a fine and that a noncomplying corporation cannot sue on a contract until it has complied.

Texas Civil Statutes Ann. (1955), Article 8.01 provides that a certificate of authority must be obtained prior to doing business; Article 8.18 provides that a noncomplying corporation shall be fined and that it may not sue on a contract unless it has a certificate of authority.

Code of Virginia Ann. (1950), Section 13.1-102 (as amended, 1956) provides that no foreign corporation shall transact business before obtaining a certificate of authority from the corporation commission; Section 13.1-19 (as amended, 1956) provides a fine and prevents an unregistered corporation from maintaining a suit until it obtains a certificate of authority.

Wyoming Statutes Ann. (1957), Section 17-36.95 (as amended, 1961) provides that a foreign corporation must obtain a certificate of authority to do business; Section 17-36.113 (as amended, 1961) provides that a foreign corporation may not sue on a contract until it has its certificate and pays taxes and monetary penalties for noncompliance.

fails to register is specifically granted, but even in these jurisdictions, reinstatement generally follows upon compliance.[6]

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[6] See e.g. Massachusetts General Laws Ann. (1955), Chapter 181, Section 19 (as amended, 1962) which authorizes the Supreme Judicial Court upon information to proceed in equity in the name of the Attorney General to restrain a foreign corporation from exercising any corporation right or franchise until compliance with Section 3 and 5 of Chapter 181, which require registration with the Secretary of State. See also Nevada Revised Statutes, Section 80.160 (Supp. 1959) which directs the Secretary of State to publish yearly in the newspapers a list of foreign corporations which have not filed with the Secretary of State their permission to do business in the state and a notice that if fees and penalties are not paid before a certain date, the defaulting corporation forfeits taxes and costs and the right to carry on business; Section 80.170 (Supp. 1959) directs the Secretary of State to give a certificate of reinstatement to any foreign corporation which pays the fees and penalties, and to file a copy of this certificate in the office of the county clerk in the county where the principal place of business of the corporation is located. Vermont Statutes Ann. (1958), Title 11, Section 861 gives the Attorney General authority to go into Chancery Court for a permanent injunction against any foreign corporation doing business without authorization from the commissioner of foreign corporations; Section 862 sets out that if a corporation complies before a permanent injunction is issued, the Attorney General's complaint may be dismissed upon payment of costs. Indiana Ann. Statutes (1960), Section 25-314 provides that a noncomplying foreign corporation can be ousted, but the case law establishes that the corporation's rights are only suspended until compliance (*Warren Co.* v. *Exodus*, 114 App. 563, 53 N. E. 2d 546, 575; *Farmers Mutual Hail Ins. Co. of Iowa* v. *Gorsuch*, 123 App. 264, 110 N. E. 2d 344. New York General Corporation Law (1963), Section 219 also provides for possibility of ouster; however, the case law clearly shows that this sanction is used only in instances where a fraud upon the people of the state has been committed (*People* v. *National Cancer Hospital of America*, 200 Misc. 363, 102 N. Y. S. 2d 103, 110, aff'd, 153 N. Y. S. 2d 63, 1 N. Y. 2d 802 (1956); *People* v. *Jewish Consumptive's Relief Society*, 196 Misc. 579, 92 N. Y. S. 2d 157 (1949). Section 1703.28, Ohio Rev. Code Ann. provides for a forfeiture of from $250-$10,000 for failure to register, but for good cause shown this may be remitted. Section 300:7, New Hampshire Rev. Stat. Ann. (1955) provides that any corporation refusing to register may be restrained from doing further business.

Thus, it seems clear that the intendment of all such laws is to compel the disclosure of relevant information about the structure and activities of the foreign corporation, to raise revenue and to make certain that the out-of-state corporation is amenable to service of process in the event of a controversy with residents of the state. The chief function of these provisions, therefore, is not to expel foreign corporations or to bar them from the state. Indeed, if such were their purpose, serious questions concerning adherence to requirements of equal protection of the laws would arise.

That the Alabama provisions are designed to achieve these general objectives is further evidenced by the fact that, under Alabama law, a contract made by a foreign corporation before it registers to do business becomes valid, if registration subsequently takes place, if both parties so regard it. *Montgomery Traction Co.* v. *Montgomery Light and Water Power Co.*, 229 Fed. 672 (5th Cir. 1916).

Where there is no law authorizing exclusion for failure to register, ouster is virtually unprecedented. In its search of the law, petitioner has come upon an 1894 case in Iowa—one of the jurisdictions with provisions similar to Alabama—in which pursuant to *quo warranto* proceedings the ouster of a foreign corporation was authorized but only if it did not comply within 60 days. The court pointed out that the corporation was under the mistaken belief that registration was not required. *State ex rel. Crossland v. Omaha & C. B. Ry.*, 91 Iowa 517, 60 N. W. 121 (1894).

Failure, not unwillingness, to register is the sole activity evidenced in this record which is even arguably illegal. This failure was a result of petitioner's good faith belief that the registration provisions did not apply to it as a non-profit organization and one whose activities were mainly of an interstate character. Cf. *Eaton* v. *Woman's Home Missionary Society*, 264 Ill. 88, 106 N. E. 746 (1914).

3. The doctrine that a state may exclude a foreign corporation on any ground, which originated in colonial times when corporations were monopolies incorporated by special act of the legislature,[7] is now of dubious reliability at best, if not totally moribund. See *Freeman* v. *Hewitt*, 329 U. S. 249; *Butler Bros. Shoe Co.* v. *U. S. Rubber Co.*, 156 Fed. 1 (8th Cir. 1907); *Crutcher* v. *Kentucky*, 141 U. S. 47; *Simonetti Bros. Produce Co.* v. *Peter Fox Brewing Co.*, 240 Ala. 91, 197 So. 38 (1940).

It is now recognized that a foreign corporation is entitled to equal protection of the laws, see, *e.g.*, *Southern Railway* v. *Greene*, 216 U. S. 400; *Western Union Telegraph Co.* v. *Kansas ex rel Coleman*, 216 U. S. 1; *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494, and being a "person" under the Fourteenth Amendment, must be accorded guarantees of due process. *Liggett* v. *Baldridge*, 278 U. S. 105; *Smyth* v. *Ames*, 169 U. S. 466,522. Just as a natural person may not be prevented from pursuing a lawful occupation, *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, so a corporation may not be prevented from engaging in lawful pursuits. *New State Ice Co.* v. *Liebmann*, 285 U. S. 262. Indeed, a corporation cannot be forced to submit to any arbitrary exercise of governmental authority. As this Court said in *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 513:

> ... A State may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. *Lawton* v. *Steele*, 152 U. S. 133, 137; *Meyer* v. *Nebraska*, 262 U. S. 390, 399.

These proceedings, therefore, must be measured against Fourteenth Amendment yardsticks of due process and equal protection to determine their validity. Petitioner respect-

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[7] *Bank of U. S.* v. *Deveaux*, 9 U. S. (5 Cranch.) 61 (1809).

fully submits that the arbitrariness, discriminatory nature and illegality of the state's acts, when appraised by those standards, are clearly revealed.

This action is the result of the kind of organization petitioner is, not because of any derelictions in compliance with Title 10. In truth, what the state is really attempting to impose upon all foreign corporations, through petitioner as an example, is agreement that they will not challenge the legality of racial segregation or seek its abolition as the price of their continued permission to operate within the state. Such an implied or implicit imposition of unconstitutional conditions violates the Fourteenth Amendment. *Williams* v. *Standard Oil Co. of Louisiana*, 278 U. S. 235; *Pullman Co.* v. *Kansas*, 216 U. S. 56, 63; *Harrison* v. *St. Louis & San Francisco Ry. Co.*, 232 U. S. 318; *Donald* v. *Philq. & Reading Coal & Iron Co.*, 241 U. S. 329; *Lafayette Ins. Co.* v. *French*, 59 U. S. (18 How) 404, 407. And see *Hill* v. *Florida*, 325 U. S. 538, 543.

III.

State registration requirements cannot justify the deterrence or stifling of the exercise of constitutionally protected rights of freedom of speech and association.

The nature of the petitioner organization has been explained in great detail to this Court in prior proceedings in this cause, *NAACP* v. *Alabama*, 357 U. S. 449, and in other cases, *e.g.*, *NAACP* v. *Button*, 371 U. S. 415. Therefore, an extended restatement of petitioner's organizational structure, operational methods, aims and purposes would appear to be unnecessary verbiage. Petitioner established its first affiliate unit in Alabama in 1918. Between 1918 and June 1, 1956, petitioner functioned in Alabama through its members and affiliates. Petitioner's only purpose—its sole

business—is the elimination of racial discrimination and segregation, and the establishment of full-fledged citizenship status for Negroes throughout the breadth and length of the United States.

It is no longer open to question that in pursuing these objectives by means of advocacy and lawful activities, including the sponsorship of litigation, petitioner and its members are engaged in the exercise of modes of expression and association protected under the Fourteenth Amendment against unwarranted state interference. See *NAACP* v. *Alabama, supra; Bates* v. *Little Rock*, 361 U. S. 516; *Louisiana* v. *NAACP*, 366 U. S. 293; *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539; *NAACP* v. *Button*, 371 U. S. 415. As this Court said in *NAACP* v. *Button, supra* at page 429:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country.

Petitioner admits giving legal aid to Autherine Lucy in her ill-fated attempt to secure admission to the University of Alabama. But *NAACP* v. *Button, supra*, makes clear that this admission furnishes no basis for punitive state action.

Petitioner also admits that it gave encouragement in the form of financial, moral and legal support to Negroes in Montgomery in their effort to secure equal treatment and the elimination of segregation on the Capital Motor Lines. Rev. Martin Luther King was found guilty of a violation of Alabama law for his activities in connection with this effort. But whether persons who, in concert, seek to persuade the public by picketing or other peaceful means, not to patronize a commercial enterprise because of its

policy of racial discrimination, are subject to state interference, in the light of the Fourteenth Amendment's guarantee of freedom of expression and association, has not been settled with finality. A case in which that issue is squarely raised is scheduled for argument this term (*NAACP* v. *Webb's City* [No. 362]). It would seem evident, therefore, that petitioner, Rev. Martin Luther King, and other persons who advocate group pressure to force commercial establishments to accord Negro consumers equal treatment, advocate a course of conduct that is, at least, arguably legitimate. Cf. *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552. However that issue may be decided ultimately, it is manifest, petitioner respectfully submits, that its illegality is not sufficiently foreclosed to support the decree in question here, particularly since the admitted support embraced only encouragement, and moral, financial and legal aid.

This Court has made clear in case after case that rights of freedom of expression and association, however unpopular, and legitimate activities in furtherance thereof, are protected against open and broad attacks as well as more indirect intrusions.

As Mr. Justice Stewart stated in *Bates* v. *Little Rock*, *supra* at page 523:

> [First Amendment freedoms] are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.

And even though the governmental interest may be valid, where these freedoms are concerned, its purpose cannot be accomplished by broadside restrictions that deter the free exercise of these rights where the government's purpose can be achieved by a more particularized and precise regulation. Again, a statement by Mr. Justice Stewart is an apt illustration of this principle. Speaking for the Court in *Shelton* v. *Tucker*, 364 U. S. 479, 488, he said:

> . . . even though the governmental purpose be legitimate and substantial, that purpose cannot be

> pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of [the] abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Mr. Justice Douglas, speaking in *Louisiana* v. *NAACP*, 366 U. S. 293, said that the Court had emphasized that all state action must be highly selective to survive challenge under the First Amendment. Continuing, he added at page 297:

> At one extreme is unlawful conduct which cannot have shelter in the First Amendment. At the other extreme are regulatory measures which, no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights.

These cases make clear that Alabama authorities could not directly and openly interfere with the rights of freedom of expression and association of petitioner and its members, except upon a showing of a subordinating important and vital state interest. See *NAACP* v. *Alabama, supra; Gibson* v. *Florida Legislative Investigation Committee, supra*; And what cannot be done directly cannot be accomplished indirectly, in the guise of enforcing registration requirements. Cf. *Bates* v. *Little Rock, supra*. This is particularly so where the state's legitimate interest can be preserved by regulations narrowly drawn and fashioned to meet the purpose which the state seeks to accomplish.

Thus, conceding that the state can require petitioner to register as an out-of-state corporation and subject it to punishment for its failure to do so, it does not follow that this judgment, which accomplishes a complete abridgment of rights of freedom of association and expression, can be sustained. A legal remedy was available to the state under Title 10, and the penalty therein provided constitutes the only possible punitive measure which the state could have validly invoked. For these reasons, petitioner respectfully contends, the judgment below must be struck down as an unconstitutional invasion of First Amendment freedoms.

IV.

The judgment of the Supreme Court of Alabama does not rest on sufficient state grounds to bar review by this Court.

The Supreme Court of Alabama affirms the judgment of the trial court on state procedural grounds. That decision, however, does not and cannot bar this Court's review on the merits and adjudication of petitioner's federally asserted claims. The Supreme Court of Alabama states that its rules require that an appellant's brief contain "argument with respect to errors assigned which counsel desire to insist upon." The court reads this rule as meaning that when assignments of error are argued "in bulk" and one is without merit, the court cannot consider others argued with it "in bulk." Significantly, petitioner's alleged violation of this rule was not raised by the state in its brief. Neither the state, nor the court on oral argument mentioned petitioner's violation of what the court now treats as a basic, well-known procedural requirement of long standing.

As can be seen by a reading of petitioner's brief (Appendix B, Petition for Writ of Certiorari), each assignment of error was argued separately. Thus, there was no violation of Rule 9(d). Neither that rule, nor any precedent in the case law exists to show that each assignment of error must appear under a different sub-section heading. Furthermore, prior rulings of the Supreme Court of Alabama show that even where flagrant violations of the rule have occurred, the assignments have been disposed of on the merits. See *Bolton* v. *Barnett Lumber Supply Co.*, 267 Ala. 74, 100 So. 2d 9 (1958); *Guy* v. *Lancaster*, 250 Ala. 287, 290, 34 So. 2d 499, 502 (1948), *Thompson* v. *State*, 267 Ala. 22, 99 So. 2d 198, 200 (1957); *Madison Limestone Co.* v. *McDonald*, 264 Ala. 295, 87 So. 2d 539 (1956); *Shelby County* v. *Baker*, 269 Ala. 111, 110 So. 2d 896 (1959); *Edge* v.

Bice, 262 Ala. 273, 82 So. 2d 252, 254 (1955); *Simmons* v. *Cochran*, 252 Ala. 461, 41 So. 2d 579, 580 (1949); *Christian* v. *Fidelity and Casualty Co. of New York*, 264 Ala. 616, 88 So. 2d 840 (1956); *Brothers* v. *Brothers*, 94 So. 175 (1922); *Wood* v. *Wood*, 82 So. 2d 556 (1955); *Quinn* v. *Hannow*, 80 So. 2d 239 (1955); *Bell* v. *Fulgham*, 202 Ala. 217, 80 So. 39 (1918); *Stariha* v. *Hagood*, 40 So. 2d 85 (1949); *Kendall Alabama Co.* v. *City of Fort Payne*, 79 So. 2d 801 (1955); *City of Montgomery* v. *Mott*, 266 Ala. 422, 96 So. 2d 766 (1957); *State v. Farabee*, 268 Ala. 437, 108 So. 2d 148 (1959); *Brooks* v. *Everett*, 271 Ala. 380, 124 So. 2d 100 (1960).

Moreover, under Alabama law the decree from which petitioner appealed is regarded as a unit and not severable. In such a case, error is regarded as permeating the entire unit. Therefore, there was no need to make separate assignments of error, and no necessity for an argument to be made under each specific assignment. One overall argument is sufficient. See *Birmingham Electric* v. *Alabama Public Service Commission*, 47 So. 2d 455 (1949); *Styles* v. *Lampert*, 94 So. 2d 784 (1957); *Hartford Fire Insurance Co.* v. *Clark*, 258 Ala. 141, 61 So. 2d 19 (1952); *Christian* v. *Fidelity and Casualty Co. of New York*, 264 *Ala.* 616, 88 So. 2d 840 (1956).

Under these circumstances, the rule of this Court in *Davis* v. *Wechsler*, 263 U. S. 22, 24; *NAACP* v. *Alabama*, *supra*, and cognate cases is applicable.

Apart from the principles enunciated in *Davis* v. *Wechsler*, *supra*, and recently reiterated in *NAACP* v. *Alabama*, in respect to the erection of new and novel procedural bars, the more recent approach to this question, as explicitly stated in *Staub* v. *Baxley*, 355 U. S. 313, and in *Wright* v. *Georgia*, 373 U. S. 284, makes clear that this case is properly before this Court for it to determine on the merits the validity of the claims asserted throughout these proceedings

by petitioner that its federally protected rights and those of its members have been violated. In *Staub* and *Wright*, this Court refused to allow the invocation of what this Court described as an "arid ritual of meaningless form" to frustrate an attempt to secure final determination of rights which petitioner asserted as being guaranteed under the Fourteenth Amendment.

The reasoning expressed below to justify a refusal to decide this cause on the merits is even more trivial than those held insufficient in the *Staub* and *Wright* cases. In the light of the long history of this case, of petitioner's persistent efforts to obtain a hearing on the merits, its repeated assertion that the injunction ousting it from the state violated both state and federal law, it is difficult to conceive of the state court being ignorant of the grounds upon which petitioner sought to establish the fatal infirmity of the trial court's decree. In 1959, Anthony Lewis, a noted commentator on the America judicial system, in reference the instant controversy stated: "What can be said for the intellectual honesty of a state court system that has kept the NAACP out of business for three years with a "temporary restraining order,' despite a Supreme Court reversal of the case almost a year ago." Yet in 1963, over three years after that comment, the Supreme Court of Alabama finds it necessary to affirm the lower court judgment without a consideration of the merits, because of the improper briefing of petitioner's argument. This would appear to be not only reliance on arid and meaningless form, but a callous indifference to petitioner's entitlement to fair play.

Since the decision below confers jurisdiction on this Court, exercise of that authority, petitioner respectfully submits, requires this Court to make its own independent evaluation of the evidentiary facts upon which the trial court's adjudic-

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[6] Lewis, *The Role of the Supreme Court*, 45 A. B. A. J. 911, 990 (1959).

ation of petitioner's constitutional claims is based. See *Garner* v. *Louisiana, supra*; *Wright* v. *Georgia, supra*.

The denial of a review on the merits by an appellate court has been struck down when invidious discrimination has been manifested. See *National Union of Marine Cooks and Stewards* v. *Arnold*, 348 U. S. 37, 41-45; *Griffin* v. *Illinois*, 351 U. S. 12, 18; *Burns* v. *Ohio*, 360 U. S. 252, 257; *Douglas* v. *California*, 372 U. S. 353. In these cases, the Fourteenth Amendment's equal protection yardstick has been held to proscribe differentiations that have no relation to a rational policy.

Since *Hovey* v. *Elliott*, 167 U. S. 409, there has been an implicit assumption that the due process clause was a barrier to arbitrariness in a court proceedings which has the effect of denying a litigant his day in court. Cf. *Societe Internationale* v. *Rogers*, 357 U. S. 197, 209, 210. And see *Aero Design & Engineering Co.* v. *Oklahoma Employment Security Comm.*, 151 F. Supp. 844, 846 (W. D. Okla. 1956), aff'd. *per curiam*, 353 U. S. 943, where the court said:

> But here, a federal constitutional question is presented of which the Supreme Court of the United States is the final judge. A full day in court contemplates as a part of the judicial process a right to be heard in the court of last resort on the constitutional question.

The Alabama Supreme Court in this cause states that "[r]ules of procedure are not traps concocted to evade decisions" (R. 221). This accords with this Court's interpretation of the federal rules of procedure. As was said in *Conley* v. *Gibson*, 355 U. S. 41, 48:

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. *Maty* v. *Grasselli Chemical Co.*, 303 U. S. 197.

And the statement in *Foman* v. *Davis*, 371 U. S. 178, 181 is particularly opposite:

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. . . . The Rules themselves provide that they are to be construed "to secure the just, speedy and inexpensive determination of every action."

Thus, both this Court and the Alabama Supreme Court agree that the function of rules of procedure is to facilitate adjudication and not to bar a final determination on the merits. Yet, the court below seeks to justify its refusal to carry out that principle on such trifling superficialities, as to warrant petitioner's claim that its day in court has been effectively denied in violation of the Fourteenth Amendment's guaranty of due process.

V.

This Court should formulate a detailed decree which, without the necessity of any further action on the part of the state court, will entitle petitioner to whatever relief the Court finds is appropriate in this case.

Petitioner has been subjected to a "temporary restraining order and injunction" since June 1, 1956, without being able to test the validity of that decree until December 27, 1961, when, under compulsion from this Court, a hearing on the merits finally took place. The cause is now before this Court for the fourth time. Throughout the 7 years and more history of these proceedings, the Supreme Court of Alabama has persisted in its refusal or failure to implement the mandate of this Court.

Finally the state granted petitioner a hearing on the merits. The record of that hearing is absolutely barren of any semblance of evidentiary support for the state's posi-

tion that ouster of petitioner is justified. The Supreme Court of Alabama sought to interpose new and novel technicalities and trivialities of procedure, in an apparent attempt to bar review by this Court of the trial court's arbitrary decree. Petitioner is confident that the law is too well settled to the contrary for this attempt to succeed. It is submitted that if this Court holds, after review on the merits, that petitioner is entitled to resume its activities in the state but leaves to the Supreme Court of Alabama the necessity of implementation of that holding, petitioner, undoubtedly, will be forced to bring the cause here for a fifth time.

The rights which petitioner asserts on its behalf and on behalf of its members are personal and present rights, as this Court held in *Sweatt* v. *Painter*, 339 U. S. 629. That principle was reiterated most recently by Mr. Justice Goldberg in *Watson* v. *Memphis*, 373 U. S. 526, 533. "The basic guarantees of our Constitution are warrants for the here and now . . .". The fact is that petitioner's Alabama operation has been destroyed. It has lost property in the form of membership dues and contributions. More importantly, however, in these past seven years, it has been denied the opportunity to be actively engaged in the struggle of Alabama citizens to secure their basic citizenship rights, and Alabama residents have been denied the right to join forces under petitioner's aegis in a concerted attempt to free themselves of the burdens of racial restrictions and restraints.

It is time for this case to be settled, and settled with finality. If the ouster of the petitioner is held to be lawful, that will finish the matter. If, however, petitioner's contentions are sustained, it is respectfully submitted that this Court can accord petitioner effective relief only by clearly setting forth, as a part of its determination, a sufficiently detailed decree, entitling petitioner to resume operations in Alabama, without the necessity of further recourse to the state courts.

CONCLUSION

Wherefore, for the reasons hereinabove stated, it is respectfully submitted, the injunction against petitioner should be vacated and a decree should be entered entitling petitioner to function in Alabama without need of its effectuation by the State Courts.

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